

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 2.106 of the Commission's)	
Rules to Allocate Spectrum at 2 GHz for use by)	ET Docket No. 95-18
the Mobile-Satellite Service)	
)	
Amendment of Part 2 of the Commission's Rules)	
to Allocate Spectrum Below 3 GHz for Mobile)	
and Fixed Services to Support the Introduction of)	ET Docket No. 00-258
New Advanced Wireless Services, including Third)	
Generation Wireless Systems)	
)	
Flexibility for Delivery of Communications by)	
Mobile Satellite Service Providers in the 2 GHz)	IB Docket No. 01-185
Band, the L-Band, and the 1.6/2.4 GHz Bands)	
)	
To: The Commission)	

REPLY TO OPPOSITION TO PETITIONS FOR RECONSIDERATION

The Association for Maximum Service Television, Inc. (MSTV), the National Association of Broadcasters (NAB), and the Society of Broadcast Engineers, Inc. (SBE)¹ hereby reply to The Boeing Company's (Boeing) consolidated opposition to their respective petitions for reconsideration in this proceeding. Boeing's opposition fails to respond effectively to the fundamental point made in the MSTV/NAB and SBE petitions: that the revised relocation plan adopted by the Commission in the *Third Report and Order and Third Memorandum Opinion & Order (Third R&O/MO&O)* was made without sufficient consideration of the facts and will significantly undermine the ability of BAS incumbents to serve the public. Boeing's opposition

¹ MSTV is a non-profit trade association of local broadcast television committed to achieving the highest technical quality for the local broadcast system. NAB is a non-profit, incorporated association of radio and television stations that serves and represents the American broadcasting industry. SBE is a non-profit, incorporated association of broadcast engineers and technical communications professionals.

offers no legitimate reason why the costs of making spectrum available for MSS and other new entrants should be borne by broadcasters serving mid-size and smaller television markets.

In the *Third R&O/MO&O*, the Commission adopted a revised BAS relocation plan that deprives BAS incumbents in Markets 31-210 of *two* BAS channels for several years after an MSS entrant begins service. MSTV/NAB and SBE explained in their reconsideration petitions how the revised plan would disrupt local news services and possibly lead to an overall reduction in the quantity and quality of local news. MSTV/NAB asked the Commission to reexamine the revised plan and to adopt an alternative plan that will ensure the continued viability of incumbent BAS services that play an important role in public safety and homeland security. Boeing's opposition does not provide any facts contradicting the concerns raised in the MSTV/NAB and SBE petitions, but instead mischaracterizes and marginalizes MSTV/NAB's and SBE's legitimate concerns.

I. THE COMMISSION'S REVISED RELOCATION PLAN WILL CAUSE MORE THAN MERE "INCONVENIENCE" BY DISRUPTING AN ESSENTIAL COMPONENT OF THE LOCAL BROADCAST SYSTEM.

As MSTV/NAB and SBE explain in their petitions, the Commission's revised relocation plan would force incumbents in markets outside the top 30 to vacate two BAS channels for several years. This burden will weigh heavily on stations and viewers in mid-size markets, like Cincinnati, New Orleans, Providence, and Milwaukee, where multiple stations typically broadcast local news (and use BAS spectrum) simultaneously. Furthermore, the revised relocation plan would cause severe market coordination problems in areas where mid-size markets are adjacent to larger markets. Boeing's opposition provides no contradictory evidence, but rather misinterprets and otherwise attempts to minimize the significance of MSTV/NAB's data.

A. Stations in Mid-Size Markets Need More than Five BAS Channels.

Responding to the Commission's plan to reduce the number of BAS channels available in markets outside the top 30, the MSTV/NAB petition sought to educate the Commission about the significant quantity of local news, and corresponding demand for ENG services, produced by the TV stations in those markets.² MSTV/NAB presented evidence showing that even markets with as few as four local news stations fully utilize the seven BAS channels now available to them, and would be unable to provide the same level of local news services with only five channels.³ This deficiency would be exacerbated in markets (usually outside the top 30) where one or more of the BAS channels is devoted to serving a fixed link.⁴ The MSTV/NAB petition also submitted data showing that television stations in nearly every market "generally devote between 20 and 25 percent of their expenses to news."⁵ Boeing does not dispute this data but argues that because mid-size stations have smaller absolute news budgets than larger stations, they must offer less news programming.⁶ But the Commission found in the *Ownership Proceeding* that most mid-size stations produce as much local news as stations in the top 30 markets.⁷

² See MSTV/NAB Petition for Reconsideration, ET Docket No. 95-18, at 8 (Jan. 7, 2004) (*MSTV/NAB Petition for Reconsideration*).

³ *Id.* Accordingly, even in a market where only stations affiliated with the four major networks air a local news broadcast, five BAS channels will be inadequate to meet ENG needs. Boeing's claim that "local news aired by more than one-third of the television stations unaffiliated with the top four networks received all of their local news programming from other stations in the same market" is thus a moot point, except that it highlights that two-thirds of unaffiliated television stations air their own local broadcasts in addition to those of the network affiliates. In addition, a station providing news to another station in its market will not necessarily duplicate its own news and may use additional ENG facilities to produce news for, or deliver news to, the other station. See *Consolidated Opposition of the Boeing Company*, ET Docket No. 95-18, at 12-13 (March 3, 2004) (*Boeing Opposition*).

⁴ *MSTV/NAB Petition for Reconsideration* at 9.

⁵ *Id.*

⁶ *Boeing Opposition* at 12-13.

⁷ For example, the four network affiliated stations in Memphis (DMA 41) collectively produce 77.5 hours per week of local news, the same amount as produced in Baltimore (DMA 24). Green Bay (DMA 69) produces 79.5 hours
(continued...)

The MSTV/NAB petition also noted that local newscasts typically include reports via ENG from several locations per station and that newscasts in a market typically occur at the same time across stations.⁸ Boeing's opposition ignores the first part of that equation and attempts to rebut the second part by asserting that "in most cities served by more than three television news operations, some stations stagger newscasts in order to increase market share."⁹ Notably, Boeing does not support this assertion with a single real-life example. And actual station practices show that such staggering, where it occurs, is not consistent across peak news broadcast times.¹⁰ Moreover, even where scheduled newscasts are staggered, all stations in a market (and often some from outside) will want to cover breaking news simultaneously.

B. The Revised Relocation Plan Will Create Substantial Market Coordination and Interference Problems.

The MSTV/NAB and SBE petitions explained that the Commission failed to consider adequately the serious market coordination and interference problems raised by the revised relocation plan. For example, under the Commission's plan broadcasters from the top 30 markets and from adjacent markets 31-210 will be incapable of providing simultaneous ENG coverage of a major news event occurring in one of the markets. To illustrate the nationwide scope of this problem, MSTV/NAB presented a detailed summary of adjacent television markets.

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each week, only 6.5 hours less than in New York (DMA 1). See Thomas C. Spavins, Loretta Denison, Scott Roberts and Jane Frenette, Media Ownership Working Group Study, *The Measurement of Local Television News and Public Affairs Programs*, App. A, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A14.pdf. Moreover, the collective cost of producing news in the "large" markets 21-30 is \$3.5 million, whereas the cost in the "smaller" markets 31-40 is \$3.2 million. *MSTV/NAB Petition for Reconsideration* at Ex. A.

⁸ *Id.* at 8. Indeed, it is this simultaneous nature of ENG use that leads to congestion.

⁹ *Boeing Opposition* at 13.

¹⁰ For example, in Salt Lake City (DMA 36), three of the four local news stations broadcast local news from 10:00 PM to 10:30 PM, with the Fox affiliate broadcasting an hour earlier. Yet *all four* major network affiliates broadcast local news from 5:30 AM to 7:30 AM.

SBE offered specific technical information about the interference problems that will occur if BAS incumbents operating on different channel plans attempt to cover the same event.¹¹ Boeing does not refute this evidence. Instead, it points obliquely to so-called “alternatives” to BAS Channels 1-7 (or 3-7) that could be used in cross-market situations.

But the options suggested by Boeing are poor substitutes at best and will not preserve the kind of inter-market coverage that is a mainstay of local broadcast services. For example, BAS Channels 8 and 9 at 2450-2483.5 MHz are subject to competing uses and are not reliably available in most markets. To begin with, the channels occupy an ISM (Part 18) and Part 15 band that suffers from tremendous noise problems due to ISM devices, Wi-Fi and other Part 15 devices and systems. Although those devices theoretically are prohibited from interfering with licensed users, as a practical matter the sources of interference cannot be identified and made to cease operations in the time-frame required to respond to news events. In other areas the spectrum is used for temporary Part 101 video production and is unavailable for ENG. Finally and most significantly, the channels are available to Part 90 public safety licensees on a co-primary basis, and are increasingly used in public safety aircraft.¹² Inter-service sharing of mobile systems is very difficult, and the SBE frequency coordination process (which works well on mobile ENG channels dedicated exclusively to BAS) has been only marginally successful in dealing with it, due to the time-critical nature of public safety video relay

¹¹ Petition for Reconsideration of the Society of Broadcast Engineers, ET Docket No. 95-18, at 2-3 (Jan. 7, 2004) (*SBE Petition for Reconsideration*).

¹² See, e.g., 47 C.F.R. § 90.20(d), n.73 (explaining that the 2450-2500 MHz band in the public safety radio pool is “[a]vailable only on a shared basis with stations in other services, and subject to no protection from interference due to the operation of industrial, scientific, or medical (ISM) devices.”); Order, *County of Los Angeles, City of Los Angeles, City of Long Beach, and City of Burbank, California; Request for a Declaratory Ruling Regarding Use of the 2450-2483.5 MHz Band for Airborne Video Safety Communications*, 16 FCC Rcd. 2227, 2228 (2001) (affirming co-equal status of broadcast and public safety licensees in 2.4 GHz band). In some cases, BAS licenses do not even authorize operations in Channels 8 and 9. And some ENG trucks are not designed to operate in that spectrum and would require additional reconfiguration in order to do so.

conducted on these channels. Broadcasters make whatever use they can of Channels 8 and 9, but their use is heavily compromised. Thus, these channels do not offer viable replacement spectrum for BAS Channels 1-7. Similarly, satellite newsgathering (SNG) services are substantially more expensive than ENG services, making them a particularly unsatisfactory alternative for broadcasters in the markets most affected by the revised relocation plan.

C. Boeing Fails to Address the Revised Relocation Plan's Homeland Security Implications.

Notably absent from Boeing's claim that the nearly thirty percent reduction in BAS channels available to incumbents outside the top 30 markets would be a mere "inconvenience" is any mention of concerns about the homeland security and public safety implications of the plan. The public will be more than "inconvenienced" if BAS services are unavailable during an emergency, whether an earthquake, hurricane, or terrorist attack. As the Media Security and Reliability Council has explained, broadcasters' ENG facilities will be of vital importance during a national emergency, ensuring "robust and redundant ways [of]... delivering live news and information from a remote site."¹³ But broadcasters will be less capable of using their ENG facilities in this manner where BAS spectrum resources are significantly reduced. Boeing's Opposition does not respond to this issue.

D. The Boeing Two-Phased Relocation Plan Will Not Alleviate the Burden on BAS Incumbents.

Failing to recognize that the spectrum to be occupied by MSS during Phase I of its modified two-phased relocation plan will cut across BAS Channels 1 and 2, Boeing contends that its plan will alleviate some of the concerns raised by the Commission's revised plan by eliminating the need for BAS incumbents in markets 31-210 to clear two BAS channels

¹³ Media Security and Reliability Council, Comprehensive Best Practices Recommendations, at 7 (March 2, 2004).

immediately upon the commencement of MSS service.¹⁴ But MSTV/NAB already explained in their Opposition to Boeing's Petition for Reconsideration or Clarification that Boeing's two-phased plan would, in the same manner as the Commission's revised plan, immediately deprive BAS incumbents outside the top 30 markets of two BAS channels.¹⁵ Thus, to the extent that the Boeing plan includes a delay in relocating markets 31-210 to the new plan and maintains the 10-year sunset of relocation compensation obligations, the Boeing proposal would in fact exacerbate the problems MSTV/NAB and SBE identified in their petitions for reconsideration.

II. IN ACCORDANCE WITH *EMERGING TECHNOLOGIES* PRINCIPLES, INCUMBENTS SHOULD BE ASSURED OF RECEIVING FULL COMPENSATION FOR RELOCATION.

A mainstay of the *Emerging Technologies* principles governing relocation of incumbents by new entrants is that "[a]ll relocation costs are to be paid by the new licensee."¹⁶ Accordingly, MSTV/NAB have asked the Commission to amend the revised relocation plan to ensure that (1) incumbents need not wait years after vacating BAS spectrum to be relocated to the new spectrum plan and (2) in the alternative, new entrants have self-executing incentives to fulfill their obligation to compensate incumbents in a timely manner. Contrary to Boeing's peculiar interpretation of this request, MSTV/NAB do *not* ask for compensation 3-5 years before relocation occurs.¹⁷

¹⁴ *Boeing Opposition* at 4-5.

¹⁵ See *MSTV/NAB Opposition to Petition for Reconsideration and Clarification of the Boeing Company*, ET Docket No. 95-18, at 2-7 (March 3, 2004). The Boeing proposal would also increase the likelihood that incumbents will receive no compensation at the time of relocation. By expanding the already lengthy time between which a BAS incumbent must vacate spectrum and when it is actually relocated, the Boeing plan would escalate the danger that the 2013 sunset date will arrive before Phase II (triggered when MSS or other entrants need spectrum) is reached.

¹⁶ Second Memorandum Opinion and Order, *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, ET Docket No. 92-9, 9 FCC Rcd 7797, 7800 (1994).

¹⁷ As clarified below, MSTV/NAB ask that relocation (and compensation) occur before the incumbents vacate current BAS spectrum *and* that effective safeguards be put in place to ensure that any incumbents forced to vacate before relocating are compensated when the entrants' relocation obligations arise.

The MSTV/NAB petition notes that the revised relocation plan provides little practical incentive for MSS entrants to relocate and negotiate with incumbents in markets 31-210 after those incumbents have vacated the spectrum needed by MSS.¹⁸ The ideal means to alleviate the related problems of channel reduction and financial insecurity for incumbents would be to have MSS (and, where appropriate, other) entrants relocate and compensate all BAS incumbents nationwide in a single phase.¹⁹ To support such a plan, MSTV/NAB have asked the Commission to develop a fuller understanding of the facts concerning BAS needs in all markets. These facts already show that many markets below the top 30 cannot persevere for 3-5 years with only five BAS channels and cannot afford the risk of non-compensation from new entrants.

MSTV/NAB also have asked the Commission to create adequate safeguards to ensure that compensation and relocation obligations are satisfied. Boeing claims that because the Commission has stated that MSS licensees are required to reimburse incumbents, “no further regulatory requirements are needed.”²⁰ Yet as noted above, that legal obligation will be hollow where the entrants already have what they want – access to clear BAS Channels 1 and 2 – without needing to negotiate with incumbents for relocation compensation. Accordingly, the Commission should eliminate the 10-year (2013) sunset and create incentives that tie the ability of entrants to continue their own operations to timely fulfillment of their relocation compensation obligations to BAS incumbents.

¹⁸ Indeed, MSS entrants appear disinclined to negotiate even with incumbents in the top 30 markets. Although more than 3 months of the one-year period for mandatory negotiations between MSS licensees and BAS stations in the top 30 markets have elapsed, MSTV/NAB are not aware of any MSS licensee’s contacting a television station.

¹⁹ If the Commission is unwilling to adopt such a requirement, at a minimum it should broaden the range of markets relocated before MSS begins service, assure that incumbents in all markets have access to some BAS equipment that can operate on the new spectrum plan, or delay relocation until new wireless entrants can contribute to relocation compensation.

²⁰ *Boeing Opposition* at 11.

The Commission should also – as both Boeing and MSTV/NAB request – “resolve [the] open question” of the compensation obligations of non-MSS entrants to the BAS spectrum²¹ and provide some guarantee that compensation by other new entrants in the vacated spectrum will be available in the event that MSS entrants’ financial condition “render[s] them incapable of paying compensation to BAS incumbents outside the top 30 markets.”²² For example, to the extent that the Commission awards some portion of the reallocated spectrum to Nextel,²³ the Commission should reevaluate the relocation compensation plan and, at a minimum, ensure that Nextel (and any other new entrants) make a contribution to the BAS relocation expenses.²⁴ Nextel’s involvement, if approved by the Commission, would appear to eliminate the financial concerns associated with MSS entrants’ ability to make up-front payments to relocate BAS incumbents. Thus, the Nextel proceeding could affect the Commission’s primary motivation for the current relocation and compensation plan and should prompt a fundamental reevaluation of the plan if the recommended proposal is adopted. Regardless of how or by whom the reallocated spectrum is used, MSTV/NAB agree with Boeing that the Commission should issue a further notice clearly stating the Commission’s intent “to require all new entrants in the 2 GHz band, regardless of their nature, to pay a *pro rata* share of incumbent relocation expenses based upon the amount of 2 GHz spectrum that they occupy.”²⁵

²¹ *Id.* at 8

²² *MSTV/NAB Petition for Reconsideration* at 13.

²³ See Mary Greczyn, *FCC Eyes Draft Giving Nextel 1.9 GHz, But At Higher Pricetag*, Communications Daily, March 11, 2004, at 7-8.

²⁴ The Commission has previously declined to change its relocation compensation plan because it was “unclear whether MSS or new terrestrial licensees will be the first to deploy service.” Third Report and Order and Third Memorandum Opinion and Order, *Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, ET Docket No. 95-18, 18 FCC Rcd. 23638, 23658 (2003). It is clear, however, that Nextel wishes to deploy quickly in any new spectrum it receives pursuant to the 800 MHz proceeding.

²⁵ *Boeing Opposition* at 8.

CONCLUSION

For the foregoing reasons, MSTV, NAB, and SBE urge the Commission to reconsider its revised relocation plan as requested in their Petitions for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Newcomer Williams, hereby certify that on this 15th day of March, 2004, I caused copies of the foregoing Opposition to Petition for Reconsideration and Clarification of The Boeing Company to be served by first-class mail and hand delivery, on:

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